

This letter responds to a questionnaire. (This is a GIL).

December 27, 1999

Dear Xxxxx:

This letter is in response to your letter dated October 21, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

We have asked for written advice from your agency regarding Tax issues and we have either not received the response we were hoping for or no response at all. Could you please help our efforts to obtain information? The questionnaire that we have asked to be completed is attached to this letter. We are asking pertinent questions related to our industry. We need written advice that we can rely on in our compliance efforts. If there is any expense associated with obtaining written advice to our request, please advise us.

This questionnaire has been sent to over 300 taxing jurisdictions and we have been successful in obtaining a written response from the majority of those responding. We do not feel this is an unreasonable request, and would appreciate any assistance you can give us.

In addition to the questionnaire, we would appreciate any brochures or pamphlets you may have as it relates to the hospitality business.

Please call if there are any questions or if you need to discuss this further. I can be reached at (901) 374-5310. Thank you for your assistance in this matter.

The Department responded by letter dated June 15, 1999, see attached, to a similar inquiry of yours. That inquiry, as does this one, included a four-page listing of numerous items and requested that we review each listed item and designate whether or not each item was subject to tax, and if so, the type of tax. We are unable to respond to your questionnaire in the format presented. However, we can provide you with the general principles concerning the applicable taxes.

The Hotel Operators' Occupation Tax Act imposes a tax upon persons engaged in the business of renting, leasing or letting rooms in a hotel. See the enclosed copy of 86 Ill. Adm. Code 480.101. The Hotel Operators' Occupation Tax applies to gross receipts received from a person who occupies a room or becomes

irrevocably liable to pay rent for the right to occupy a specific room or rooms. See Section 480.101(c)(1). Therefore, when a person becomes liable for paying a charge to rent a room, those gross receipts are subject to tax whether or not the person shows up to occupy the room.

The Hotel Operators' Occupation Tax is imposed on receipts from renting rooms for living quarters or for sleeping or housekeeping accommodations and does not apply to receipts from the renting of rooms for other purposes, such as for use as display rooms or sample rooms, as meeting rooms, as offices or as private dining rooms. See Section 480.101(b)(1). Therefore, charges for the rental of a banquet facility are not subject to the Hotel Operators' Occupation Tax.

Please note that the Hotel Operators' Occupation Tax is a tax imposed upon hotel operators and not hotel guests. The Hotel Operators' Occupation Tax Act allows hotel operators to collect an amount from their customers that represents reimbursement for the hotel operators' tax liability. As a result, there is no tax that is imposed upon guests from which they can be exempted. The fact that these guests hold exemption identification numbers issued by the Department does not exempt them from reimbursement.

The only exemptions available to hotel operators are for rentals to permanent residents and to certain diplomatic personnel. A permanent resident is considered a person who occupies or has the right to occupy a room for at least 30 consecutive days. See Section 480.101(a)(1). The exemption for rentals to certain diplomatic personnel applies only to diplomatic personnel possessing certain types of diplomatic tax exemption cards issued by the U.S. Department of State, Office of Foreign Missions. See the enclosed copy of 86 Ill. Adm. Code Ch. I, Sec. 130 Illustration A.

In general, the receipts charged by hotels as a result of their provision of in-room movies are subject to the Hotel Operators' Occupation Tax. It is the Department's position that in-room movies provided by hotel operators constitute "services" or "accommodations accompanying the use and possession of the room" that are subject to tax. However, the Department is aware that there may exist situations in which third-party video companies, as opposed to the hotel operators, provide in-room movies directly to hotel guests. An examination of all the facts and circumstances would have to be done in order for the Department to determine whether this is the case in any particular situation. In situations where the Department finds that third-party video companies, rather than the hotel operators, are actually providing the in-room movies directly to the hotel guests, the Hotel Operators' Occupation Tax would not apply.

The Retailers' Occupation Tax imposes a tax upon persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2 (1996 State Bar Edition). The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. 35 ILCS 105/3 (1996 State Bar Edition). Sales of food by hotels, whether in restaurants, coffee shops, or catered functions are subject to Retailers' Occupation Tax. In addition, the purchaser of the food incurs a corresponding Use Tax liability. Sales of items through vending machines or gift shops of

hotels are also subject to Retailers' Occupation Tax and Use Tax. When individual members of exclusively charitable, religious or educational organizations, or individual employees of governments or their agencies, purchase meals or other tangible personal property from hotels, the hotels incur Retailers' Occupation Tax liabilities. However, if governments, churches, schools, or charities possess valid tax exemption identification numbers issued by the Department and the organization itself directly purchases meals in the performance of some organizational function, such purchases could be made tax free upon presentation of the Department-issued exemption numbers.

Please find enclosed a copy of 86 Ill. Adm. Code 130.2070 concerning Sales of Containers, Wrapping and Packing Materials and Related Products. As you can see from the regulation, nonreusable tangible personal property sold to food and beverage vendors, including persons engaged in the business of operating restaurants, cafeterias or drive-ins, is a sale for resale when it is transferred to customers in the ordinary course of business as part of the sale of food or beverages and is used to deliver, package, or consume food or beverages, regardless of where consumption of the food or beverage occurs. See Section 130.2070(b)(3). Examples of such items include, but are not limited to, paper and plastic cups, plates, baskets, boxes, sleeves, buckets or other containers, utensils, straws, placemats, napkins, doggie bags and wrapping or packaging materials that cannot be reused by the food or beverage vendor and which are transferred to customers as part of the sale of food or beverages. Such items do not include items that are used by the food vendor in conducting his business and that are not transferred to the customer, including but not limited to, paper products, serving trays, serving dishes, utensils or condiment bottles.

With regard to complimentary food and beverages, persons who give merchandise away to others are considered to be the end users of such items being given away. As such, donors owe Use Tax on the donor's cost price of the tangible personal property that is transferred.

In addition, sales of items, such as towels, drinking cups, and soap, to businesses, such as hotels and office buildings, for use in the businesses are sales subject to Retailers' Occupation Tax and Use Tax. See *Theo. B. Robertson Products Co. v. Nudelman*, 389 Ill. 281 (1945).

When persons or businesses purchase tangible personal property from vendors that they will resell to purchasers, they may purchase such items tax-free by providing their vendors with properly executed Certificates of Resale. Certificates of Resale are valid if they contain the information set forth in 86 Ill. Adm. Code 130.1405. If such persons or businesses fail to provide Certificates of Resale, the sales are presumed to not be for resale and sellers would incur Retailers' Occupation Tax and be required to collect the corresponding Use Tax from purchasers. Please note, however, that consumable supplies used by hotels are subject to Use Tax.

Generally, proceeds from mandatory service charges separately stated on customers' bills for the purchase and consumption of food and beverages are not subject to tax, to the extent that the proceeds are in fact turned over as tips

or as a substitute for tips to the employees who participate directly in preparing, serving, hosting or cleaning up the food or beverage function with respect to which the service charge is imposed are not subject to tax. 35 ILCS 120/2-5(15).

With regard to equipment rental, in Illinois, lessors of tangible personal property under a true lease, except for automobiles leased for terms of one year or less, are considered to be the end users of the property to be leased. See the enclosed copies of 86 Ill. Adm. Code 130.220 and 130.2010. As the end users of tangible personal property located in Illinois, lessors incur Use Tax on the lessors' cost price of the property. Since lessors are considered the end users of the property and have paid the Use Tax, no Retailers' Occupation Tax is imposed upon the rental receipts and the lessees incur no Use Tax liability for the rental charges. In Illinois, a true lease generally has no buy out provision at the close of the lease. If a buy out provision does exist, it must be a fair market value buy out option in order to maintain the character of the true lease.

The alternative to a true lease is a conditional sale. In Illinois, a conditional sale is usually characterized by a nominal purchase option at the close of the lease term. This type of transaction is considered a conditional sale at the outset of the transaction making all receipts subject to Retailers' Occupation Tax. See Section 130.2010. In this situation, lessors/retailers may give Certificates of Resale to their suppliers for tangible personal property transferred subject to a conditional sales agreement. The lessors/retailers owe Retailers' Occupation Tax on any installment payments when they are received by the lessors/retailers. The lessees/purchasers owe corresponding Use Tax on the amount of the installment payments that are collected by the lessors/retailers.

With regard to laundry and dry cleaning services, under the Service Occupation Tax Act, servicemen are taxed on tangible personal property transferred as an incident to sales of service. See the enclosed copy of 86 Ill. Adm. Code 140.101. The purchase of tangible personal property that is transferred to the service customer may result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon which tax base the servicemen choose to calculate their tax liability. The servicemen may calculate their tax base in one of four ways: (1) separately stated selling price of tangible personal property transferred incident to service; (2) 50% of the servicemen's entire bill; (3) Service Occupation Tax on the servicemen's cost price if the servicemen are registered de minimis servicemen; or (4) Use Tax on the servicemen's cost price if the servicemen are de minimis and are not otherwise required to be registered under the Retailers' Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of the tangible personal property transferred incident to the sale of service. The tax is based on the separately stated selling price of the tangible personal property transferred. If the servicemen do not wish to separately state the selling price of the tangible personal property transferred, the servicemen must use 50% of the entire bill to the service customer as the tax base. Both of the above methods provide that in no event may the tax base be less than the servicemen's cost price of the tangible personal property transferred.

The third way servicemen may account for tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers' Occupation Tax liability with respect to a portion of their business. Servicemen may qualify as de minimis if they determine that the annual aggregate cost price of tangible personal property transferred incident to their sales of service is less than 35% of the servicemen's annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). This class of registered de minimis servicemen is authorized to pay Service Occupation Tax (which includes local taxes) based upon the cost price of tangible personal property transferred incident to the sale of service. They remit the tax to the Department by filing returns and do not pay tax to suppliers. They provide suppliers with Certificates of Resale for the property transferred to service customers.

The final method of determining tax liability may be used by de minimis servicemen that are not otherwise required to be registered under the Retailers' Occupation Tax Act. Servicemen may qualify as de minimis if the servicemen determine that the annual aggregate cost price of tangible personal property transferred incident to their sales of service is less than 35% of the servicemen's annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). Such de minimis servicemen may pay Use Tax to their suppliers or may self-assess and remit Use Tax to the Department when making purchases from unregistered out-of-State suppliers. The servicemen are not authorized to collect "tax" from their service customers nor are the servicemen liable for Service Occupation Tax. It should be noted that servicemen no longer have the option of determining whether they are de minimis using a transaction by transaction basis.

The Telecommunications Excise Tax Act, 35 ILCS 630/3 (1996 State Bar Edition), imposes a tax upon the act or privilege of originating or receiving intrastate or interstate telecommunications by a person in this State at the rate of 7% of the gross charges for such telecommunications purchased at retail from a retailer by such person. When hotels provide telephone and facsimile services to guests, they are subject to the Telecommunications Excise Tax based upon gross receipts of such services. They are required to register as retailers of telecommunications and collect and remit tax to the Department.

Often, sales of tangible personal property upon cessation of a business are not subject to Retailers' Occupation Tax. This is generally the case when a retailer's capital assets are sold. When the seller is not in the business of selling such assets, such sales are considered to be exempt occasional sales. See 86 Ill. Adm. Code 130.110, enclosed. When inventory is sold, it is often sold to the new purchaser for resale purposes. See 86 Ill. Adm. Code 130.1401 and 130.1405.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further

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questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Gina Roccaforte
Associate Counsel

GR:msk
Enc.